Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Price Cap Regulation of Local Exchange Carriers	)	CC Docket No. 93-179
	)	
	)	
Rate of Return Sharing and Lower Formula Adjustment	)	
	)	

OPPOSITION TO PETITION FOR RECONSIDERATION

BellSouth Telecommunications, Inc. ("BellSouth"), through undersigned counsel, hereby respectfully opposes the Petition for Reconsideration ("PFR") filed by MCI Telecommunications Corporation ("MCI") in the captioned proceeding on May 24, 1995. MCI alone seeks reconsideration of the Commission's Report and Order, FCC 95-133, released April 14, 1995. Notice of MCI's PFR was published in the Federal Register on June 7, 1995. 60 F.Reg. 30086. The Notice requires that oppositions to the PFR must be filed by June 22, 1995.

In the Report and Order the Commission adopted rules explicitly adding a requirement that price cap local exchange carriers ("LECs") that have implemented a sharing obligation in a given year "add-back" the amount of that sharing obligation, including interest, in the following year when calculating earnings. In recognition of the general rule against retroactive rulemaking, the Commission made its ruling effective with the LECs' 1995 annual access tariff filings. In its PFR, MCI asks the Commission "to

make add-back retroactive to the first annual access filing in which add-backs would have been implemented, i.e., 1993."

MCI bases its request on an incorrect factual premise, and it simply ignores the legal prohibition against retroactive rulemaking. As a result, its PFR is without merit and must be dismissed. MCI states:

> As the Commission rightly points out, add-back was the status quo for computation of the LECs' rate of return under rate of return regulation, and nothing in the Commission's LEC price cap decision amended or modified those computational requirements in any way. Absent any Commission direction to the contrary, therefore, there could be no expectation that the Commission's existing add-back requirement would have disappeared. PFR at 3.

MCI is wrong in each of its assertions in this paragraph. First, at the time the Commission adopted the LEC price cap order, add-back was not the status quo for rate of return carriers. Under rate of return, what was added-back was the amount of automatic refunds required under the Commission's automatic refund rules. The Commission's automatic refund rules were reversed by the Court of Appeals in AT&T v. FCC, 836 F.2d 1386 (D.C. Cir. 1988). From that time on, there were no refunds. Hence, no LEC filing a Form 492 after AT&T had anything to add-back. Therefore, the status quo was that add-back did not exist when the LEC price cap plan became effective.

Second, the Commission did modify the computational requirements for price cap LECs. The Commission adopted new reporting requirements for price cap LECs in Section 65.600

of the Rules. After the effective date of the LEC price cap plan, the Commission's rule governing reporting by rate of return carriers is Section 65.600(b), and the prescribed earnings report for rate of return LECs is FCC Form 492. The Commission's rule governing reporting by price cap LECs is Section 65.600(d) and the prescribed earnings report for the price cap LECs is FCC Form 492A. Form 492A deleted the add-back calculations required on Form 492. BellSouth provided a detailed comparison of Forms 492 and 492A in its comments in this proceeding. BellSouth Comments at 4-9 (August 2, 1993). That analysis demonstrates that, whatever the Commission's intent, the original LEC price cap rules did not permit or require add-back.

Finally, any doubt about whether the existing rules permit or require add-back was eliminated in this proceeding when the Commission for the first time expressly adopted an add-back requirement in Section 61.3(e) of its rules, and delegated to the Common Carrier Bureau the authority to revise FCC Form 492A to reflect an add-back requirement. See Report and Order at para. 56 and footnote 66. These rule changes would have been unnecessary had the existing rules required or permitted add-back.

In addition to misstating the facts, MCI ignores the applicable law. The law is clear that when the Commission's rules are unambiguous, it is the language of the rules, not the Commission's subjective intent, that governs. In AT&T

v. FCC, 974 F.2d 1351 (D.C. Cir. 1992), the Court expressly rejected an attempt by the Commission to "clarify" the price cap rules applicable to AT&T's promotional services when the existing rules were silent on the issue. MCI's request that the Commission "clarify" its intent and impose an add-back requirement applicable to prior periods is simply invitation to commit reversible error.

MCI does not even acknowledge, must less discuss, the legal prohibition against retroactive rulemaking cited by the Commission in the Report and Order. MCI simply attempts to finesse the issue by asserting that:

> [T]he rule the Commission adopted is not a new rule; it is merely a codification of long-standing, and prior to the advent of price cap regulation, unopposed Commission practice. PFR at 3.

MCI also cites the Commission's statement that adoption of an add-back requirement "does not constitute a major change in the LEC price cap rules". PFR at 3, citing Report and Order at para. 50. It is irrelevant whether the adoption of a rule is considered a "codification" of prior practice, or whether the change is major or minor. The law is clear that the new rule cannot be applied retroactively. Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988). MCI's request for retroactive application of the rules adopted in the Report and Order must be rejected.

The reason that retroactive rulemaking is prohibited is highlighted by MCI's petition. The Commission adopted a

price cap regime that required each LEC to make choices based on its evaluation of financial impact of the available options. Having made those elections, it is grossly unfair to retroactively change the ground rules without affording the effected parties an equal opportunity to revisit the choices made. Unless the Commission is willing to allow the LECs to retroactively revisit the 3.3/4.3 decisions they made each year under the original price cap rules, the Commission must deny MCI's petition.

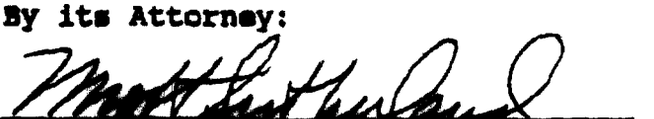
CONCLUSION

In conclusion, the Commission's finding at paragraph 50 of the Report and Order that "add-back adjustments are necessary to achieve fully the purpose of the sharing and low-end adjustment mechanisms" may be a sufficient basis to adopt an add-back requirement on a forward-looking basis, but it is insufficient to overcome the legal prohibition against retroactive rulemaking. MCI's request for retroactive application of the new rules must be rejected.

Respectfully submitted:

BELLSOUTH TELECOMMUNICATIONS, INC.

By its Attorney:



M. Robert Sutherland

4300 Southern Bell Center
675 West Peachtree Street, N.E.
Atlanta, Georgia 30375
(404) 529-3854

June 22, 1995

CERTIFICATE OF SERVICE

I hereby certify that I have this 22th day of June, 1995, serviced all parties to this action with the foregoing OPPOSITION TO PETITION FOR RECONSIDERATION reference to Docket CC 93-179, by hand delivery or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties as set forth on the attached service list.

Julia W. Spires

Hon. Janet Reno, Esq.
Attorney General
Department of Justice
Room 5111
10th Street & Constitution Ave., N.W.
Washington, D.C. 20530

William E. Kennard, Esq.
General Counsel
Office of the General Counsel
Federal Communications Commission
Room 614
1919 M Street, N.W.
Washington, D.C. 20554

Michael E. Glover
Edward Shakin
Edward D. Young, III
Attorneys for
Bell Atlantic Telephone Companies
1320 North Court House Road
Eighth Floor
Arlington, VA 22201

Edward R. Wholl
Joseph Di Bella
NYNEX Telephone Companies
120 Bloomingdale Road
White Plains, N.Y. 10605

Robert M. Lynch
Richard C. Hartgrove
Thomas A. Pajda
Southwestern Bell Tel. Co.
One Bell Center, Suite 3520
St. Louis, MO 63101

Richard McKenna
HQE03J36
GTE Service Corporation
P. O. Box 152092
Irving, TX 75015

Michael J. Shortley
Rochester Telephone Corporation
180 South Clinton Avenue
Rochester, N.Y. 14646

Jo Anne Goddard
Pacific Telesis
1275 Pennsylvania Ave., N.W.
Suite 1200
Washington, D.C. 20036

James T. Hannon
U. S. West Communications, Inc.
1020 19th Street, N.W.
Suite 700
Washington, D.C. 20036

Gail L. Polivy
GTE
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036

Francine J. Berry
Robert J. McKee
Peter H. Jacoby
AT&T
295 North Maple Avenue
Room 3244J1
Basking Ridge, N. J. 07920

Randy R. Klaus, CPA
MCI Telecommunications Corp.
701 Brazos Street
Suite 600
Austin, TX 78701

Mary McDermott
Linda Kent
USTA
1401 H Street, N.W.
Suite 600
Washington, D.C. 20005-2136

Rochelle D. Jones
SNET
227 Church Street
New Haven, CT 06506

Lawrence R. Sidman
Eric T. Werner
Verner, Liipfert, Bernhard
McPherson & Hand, Chtd.
901 Fifteenth St., N.W.
Suite 700
Washington, D.C. 20005

Michael S. Fulton
2600 W. Ameritech Center Drive
Hoffman Estates, IL 60196

Kathleen Wallman
Chief, Common Carrier Bureau
Room 500
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

International Transcription Service
Suite 140
2100 M Street, N.W.
Washington, D.C. 20037

James L. Wurtz
Margaret E. Garber
Attorneys for
Pacific Bell
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Lucille M. Mates
John W. Bogy
Attorneys for
Pacific Bell
140 New Montgomery Street
Room 1526A
San Francisco, CA 94105

Chris Frentrup
Senior Regulatory Analyst
Federal Regulatory
MCI Telecommunications Corp.
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006